JAFRI ELIAS

v.

KHOR TANG SEAH

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CIVIL APPEAL NO. 12-15-1990]
1 MARCH 1990

TORT: *Whether plaintiff and defendant equally negligent in causing accident - Evaluation of evidence by learned Judge at first instance - Whether the plaintiff or defendant had the right of way at the material time of accident - Whether there is the appreciation of the evidence in the case - Whether it was justified to put liability on the defendant - Onus of proof not discharged by plaintiff.*

This is an appeal against the decision of the learned Judge of the Session's Court Alor Setar who found the plaintiff and the defendant equally negligent in causing an accident which took place at a light controlled crossing.

Inter alia, the learned Judge of the Session's Court found, and this was borne out of the notes of evidence that the evidence was conflicting as to how the accident took place.

The appellate Court in reviewing the evidential findings of the Court of first instance, raised the following pertinent questions. That is, whether the light turned red for the defendant before he crossed? Did the learned Judge make a definite finding that the light had turned red against the defendant? Or did he make a finding that the defendant succeeded in beating the light? Or whether the Judge was unsure of himself.

It was also pointed out that the independent witness PW3 never stated that the light had turned green for the plaintiff.

Held:

[1] The point is if the red signal was against the defendant the defendant, had no business crossing the road, as pointed out in *Ward v. London County Council* [1938] the red signal is a signal of absolute prohibition. And the defendant's liability in the accident, in the event, would be absolute, not partial.

[2] The learned Judge had found as a fact that the traffic lights were in working order and that the opposing traffic lights could not be green simultaneously.

[3] The Court took the view that it was unjustified for the Judge to put liability at all on the defendant when the plaintiff had not discharged the onus of proof on him on balance of probabilities that the accident was caused by the negligence of the defendant either wholly or partially.

[Appeal of the defendant allowed with costs.]

Case referred to:
Ward v. London County Council [1938] 2 All ER 341 ***(foll)***

For the appellant - Shyama Nair; M/s. Bala Mahesan
For the respondent - T. Jegadeeson; M/s. Lim Kiam Hoon & Co.

JUDGMENT

KC Vohrah J:

This is an appeal against the decision of the learned Judge of the Session's Court Alor Setar who found the plaintiff and the defendant equally negligent in causing an accident which took place at a light controlled crossing. The motor accident took place at the junction of the Anak Bukit - Alor Setar Highway and the Jalan Sultanah (Mergong - Jalan Langgar) highway.

The Anak Bukit - Alor Setar highway runs roughly north - south while the Mergong - Jalan Langgar highway runs roughly west - east. Signal lights, strategically placed at 4 points of the junction, regulate the traffic.

The motor accident on 26 July 1985 at the junction was between a lorry driven by the plaintiff proceeding from Alor Setar (from south) to Anak Bukit (to north).

The learned Judge of the Session's Court found, and this was borne out by the notes of evidence, that the evidence was conflicting as to how the accident took place.

The plaintiff (PW4) could not remember much about the accident. During examination-in-chief he said that he saw the green traffic light meant for those who wished to turn right. From his evidence it was not clear as to where he was proceeding towards but from the evidence of PW3 and the defendant it is clear that he was turning from north to west. The plaintiff stated that while proceeding to his right he heard a loud sound and he said he could not recall what happened after that. The learned Judge of the Session's Court observed that the plaintiff kept repeating that the light showed green and that he turned right and the Judge opined that the weaknesses in the plaintiff's testimony could have been due to the severe head injuries that he had suffered in the accident. It has to be pointed out, although the learned Judge did not mention it in his judgment, that the plaintiff did say that he was not sure if the green light was from a round device or from a device that showed an arrow. If the light that faced him was the green arrow it meant that he could turn right. If the light was green from the round device it meant that traffic from north to south and from south to north could proceed but he was not permitted to turn westwards.

The defendant's version of the accident was that he was proceeding from south to north and the light signal facing him showed green. He also said that the green arrow for traffic to turn from south to east had not come on and that there was a car on his right waiting to turn right.

I pause here to note that if his evidence that the green arrow for traffic to turn from south to east had not come on is considered and accepted it means correspondingly that the green arrow for traffic to turn from north to west had not come on. According to the defendant the collision occurred because the plaintiff's lorry had turned west across his path and that despite evasive measures he could not avoid colliding into the plaintiff's lorry. He also testified, but the learned Judge did not mention the matter, that when he saw the lorry coming from the north it was in the second lane (of four lanes), one of two lanes meant for traffic proceeding to Alor Setar (that is southwards). He said that the lorry suddenly turned towards Mergong.

PW3 was an eyewitness. He was riding a motor cycle from Mergong (from west) intending to go to Alor Setar (to south). He stopped at the Mergong side of the junction as the traffic light facing him showed red. He then saw a lorry turning from north towards his direction,

west, without stopping at the traffic light. He could not see if the light facing the lorry (before it turned) was green. He also saw a car travelling fast from south to north. A collision occurred between the two vehicles. He said that after the collision the lorry knocked into his motor cycle.

The defendant's witness, DW1, a passenger in the defendant's car at the time of the accident, did not know how the accident took place but he said the defendant was travelling fast, about 70 k.p.h. The defendant on the other hand said he was travelling at about 50 to 60 k.p.h.

In evaluating the evidence the learned Judge reduced the main issues in the case to two:

> The basic question in this case was whether the plaintiff or the defendant had the right of way at the material time. This in turn depended on whether the traffic lights in the plaintiff's direction or in the defendant's direction were green before the accident.

The learned Judge was of the view, relying on the evidence of the investigating officer of the case, that the traffic lights regulating traffic at the junction were in working order and that being so the light (the arrow) facing the plaintiff and the light facing the defendant could not have shown green simultaneously. This is a perfectly logical conclusion.

The learned Judge had difficulty in accepting the evidence of "partisan witnesses" (by that I think he meant the plaintiff and the defendant), and his conclusion was this:

> Upon a proper consideration of all the evidence put forthwith in this case, I found, on a balance of probabilities, that the circumstances were more consistent with the defendant trying to beat the appropriate traffic light before it could turn red and thereby causing the accident.

But had the light turned red for the defendant before he crossed? Did the learned Judge make a definite finding that the light had turned red against the defendant? Or did he make a finding that the defendant succeeded in beating the light? The Judge was unsure of himself as can be seen from what he said next:

> However, it was clear from PW3's evidence that the plaintiff did not stop or even slow down before making the right turn **even though the light may have turned green.** He had thus failed to exercise the necessary caution in ascertaining whether the crossing was clear before turning across the path of the traffic.
> (Emphasis added)

It must be pointed out that the independent witness, PW3 never stated that the light had turned green for the plaintiff. In fact PW3 said that he could not see if the light facing the plaintiff was green. Had the light (the arrow) turned green for the plaintiff when he turned? It was not a question whether it may have turned green. It is quite clear from the above para., especially the portion emphasised, that the learned Judge did not make a finding that the light had turned green for the plaintiff; in fact he was uncertain whether the light showed green for the defendant.

The point is if the red signal was against the defendant the defendant had no business crossing the road, and as pointed out in *Ward v. London County Council* [1938] 2 All ER 341, the red signal is a signal of absolute prohibition. And the defendant's liability in the accident, in that event, would be absolute, not partial.

Going through the judgment of the learned Judge it would appear there has been some confusion in his appreciation of the evidence in the case. At p. 2 of his judgment (see folio 34 of appeal record) paras. 2, 3 & 5 the learned Judge unfortunately got the parties in the case mixed up. In addition he did not consider certain items of evidence.

It will be remembered, as stated earlier, that the defendant had said that the plaintiff was in the second lane (one of two lanes) meant for traffic proceeding from north to south and not on the lane for traffic intending to turn westwards to Mergong. In other words the defendant did not expect the plaintiff to turn westwards. As was pointed out too there was also the evidence of the defendant that he saw a car on his right (on his side of the road) which was stationary at the traffic light. This meant, if the evidence was true, that the car intended to turn right (eastwards) and since it was stationary the green arrow meant for vehicles turning to the east had not come on and therefore the corresponding green arrow for turning west facing the plaintiff had not come on as well. The learned Judge did not give an indication whether he considered these aspects of the evidence and that after he had considered them he had rejected them.

The evidence of the plaintiff was that he saw the traffic light facing him as green but he was not sure whether the green light was from a round device (indicating through traffic north - south, south - north) or whether the green light showed an arrow (for traffic turning westwards to Mergong). The learned Judge merely thought that the weaknesses in the testimony of the plaintiff were due to the severe head injuries that he had suffered in the accident. But what has to be considered is that he was put in the witness stand and he gave evidence and he was not sure as to whether the light for him to proceed westwards had come on. The plaintiff had not shown from his own evidence or other evidence that the defendant was negligent and the onus is always on the plaintiff unless he can discharge it on balance of probabilities.

The learned Judge had found as a fact that the traffic lights were in working order and that the opposing traffic lights could not be green simultaneously. In my view it was unjustified for the Judge to put liability at all on the defendant when the plaintiff had not discharged the onus of proof on him on balance of probabilities that the accident was caused by the negligence of the defendant either wholly or partially and I therefore allowed the appeal of the defendant with costs.

Also found at [1992] 2 CLJ 1016